Supreme Court, U. S.
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In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1500

ROBERT TEICHER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
(617) 661-1965

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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OCTOBER TERM, 1979.

No. .

ROBERT TEICHER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Robert Teicher petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit affirming his conviction.

Introductory Statement.

This case raises, *inter alia*, the important question whether a woman who "lives with" a man may be presumed to be his agent or co-conspirator for purposes of determining the admis-

sibility, under Federal Rule of Evidence 801, of out-of-court statements made by her. The lower courts agreed with the Government's assertion that a woman who lives with a man is — by that fact alone — "like any wife . . . authorized to communicate on behalf of her spouse with mutual friends." The lower courts also held that a woman who lives with a man and thereby obtains some knowledge of his alleged criminal activities may, by those facts alone, be deemed to be a co-conspirator with him. This kind of reasoning is anachronistic and invidious; at bottom it assumes that a woman, whether she lives with or is married to a man, is his agent and that her communications and actions are under his control. In an age where more and more couples are living together, the lower courts require authoritative guidance on this important issue. Moreover, the reasoning underlying the lower courts' decisions is inconsistent with the direction of this Court's recent opinion in *Trammel* v. *United States*, 48 U.S.L.W. 4201 (Feb. 27, 1980).

Proceedings Below.

After a jury trial in the United States District Court for the Eastern District of New York (Platt, J.), petitioner Robert Teicher was convicted of five counts of possessing with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a) (1) and 18 U.S.C. § 2; five counts of importation of controlled substances, in violation of 21 U.S.C. §§ 952(a) and 960(a) (1) and 18 U.S.C. § 2; and one count of conspiring to import, distribute and possess with intent to distribute quantities of heroin hydrochloride and cocaine hydrochloride, in violation of 21 U.S.C. § 846. Petitioner Teicher was sentenced to ten years' imprisonment on each count and all sentences were directed to run concurrently.

Petitioner appealed from the judgment of the District Court entered on September 21, 1979; whereupon, his conviction was affirmed by the United States Court of Appeals for the Second Circuit. The opinion of the Court of Appeals is unreported and is reproduced as Appendix A, *infra*. Petitioner Teicher's motions for rehearing and rehearing *en banc* were denied on March 5, 1980. The orders denying rehearing are reproduced as Appendix B, *infra*.

Jurisdiction.

This Court has jurisdiction to review the judgment below under the provisions of 28 U.S.C. § 1254.

Federal Rules Involved.

FEDERAL RULE OF EVIDENCE 801 (Definitions).

(d) *Statements which are not hearsay.* — A statement is not hearsay if —

. . . . . .

(2) *Admission by party-opponent.* — The statement is offered against a party and is . . . (C) a statement by a person authorized by him to make a statement concerning the subject, or . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

FEDERAL RULE OF CRIMINAL PROCEDURE 14 (Relief from Prejudicial Joinder).

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. . . .

Questions Presented.

I. Whether the statements of a woman who "lives with" the defendant and apparently has some knowledge of his alleged criminal activity are, by these facts alone, admissible as either an authorized admission by an agent, under Fed. R. Evid. 801(d) (2) (C), or as statements of a co-conspirator during the course of and in furtherance of the conspiracy, under Fed. R. Evid. 801(d) (2) (E).

II. Whether the petitioner was substantially prejudiced by the joinder of counts involving the actual seizure of heroin from the alleged accomplice with those involving earlier trips for which there was no tangible evidence.

Statement of the Case.

On the night of July 6, 1978, one Ann Slattery arrived at John F. Kennedy International Airport ("JFK") on a plane from Bangkok, Thailand. Slattery approached the Customs service

belt with two suitcases and a large handbag. Upon inspection of the smaller of the two suitcases, the Customs Inspector discovered a false bottom in the suitcase. Concealed in this false bottom was approximately 1,300 grams of 94 per cent pure heroin. Slattery was put under arrest, immediately questioned by Drug Enforcement Administration ("DEA") agents, and admitted knowing that there was heroin in the suitcase. She quickly agreed to cooperate with DEA agents, and to participate in a so-called "controlled delivery" the next day at the Howard Johnson's Motel near the airport. She checked into the Howard Johnson's the night of July 6, with DEA agents occupying an adjoining room.

After checking in at approximately ten o'clock, Slattery called Teicher's residence in Massachusetts. Debbie MacIntyre, Teicher's girlfriend, answered the phone and advised Slattery that Teicher had left his Massachusetts residence a little while before and that he would be meeting Slattery soon. MacIntyre, who Slattery testified had previously been advised of the purpose of this last trip, then asked Slattery whether there had been any problems. When Slattery advised that there had been none, MacIntyre said, "that's fantastic."

Approximately a half hour later, Teicher called Slattery and advised her that he would not be coming to pick her up until the next morning. He, like MacIntyre, asked if there had been any problems and was advised that there had been none. Both of these conversations were recorded by the DEA agents, who had placed taping monitors on Slattery's telephone.

On the morning of July 7, 1978, petitioner Teicher arrived at the Howard Johnson's Motel, and, while under surveillance, called Slattery's room from a telephone in the lobby. Thereafter, he proceeded to Slattery's room and entered. He and Slattery immediately left the room with Teicher carrying one suitcase and Slattery the other. The DEA agents arrested Teicher at the elevator.

After having testified before a federal grand jury in July, 1978, Slattery entered into an agreement with the Government whereby, in return for her cooperation and testimony, she was permitted to plead guilty to one count, carrying a maximum penalty of five years of imprisonment. Subsequent to this agreement, Slattery was debriefed a number of times by DEA agents.

On March 29, 1979, Teicher was indicted for his participation in the July, 1978, importation of heroin from Bangkok, Thailand. In May and June, 1978, superseding indictments were filed against Teicher relating not only to the July, 1978, transaction, but also to the four previous transactions described by Slattery. In all, eleven counts were filed against petitioner.

A jury trial of this matter took place between July 10 and 16, 1978, before the Honorable Thomas C. Platt. The bulk of the Government's case was presented through the testimony of Slattery.

Slattery testified that she met Robert Teicher at the University of Massachusetts in December, 1975, or January, 1976, and they were lovers for approximately six months thereafter. After this six-month period, a platonic relationship ensued. Slattery and Teicher still saw each other from time to time — sometimes on a weekly basis and sometimes on a monthly basis. Nevertheless, they were still friendly. Slattery started going out with an individual named Willie Marchinczyk, while Teicher started seeing one Debbie MacIntyre. Slattery testified that Teicher had been living with MacIntyre for the two years preceding the trial. Slattery testified that she had participated in smuggling ventures with Teicher, starting in the summer of 1976 and culminating with the one for which she was arrested on July 6, 1978. Her testimony as to the first four alleged ventures was uncorroborated, and there was no

tangible evidence presented by the Government for these alleged activities.

The taped telephone conversations between Slattery and MacIntyre and Slattery and Teicher of July 6 and 7, 1978, were played for the jury over defense counsel's objections.

Reasons for Granting the Writ.

I. The Decision Below, Affirming the Admissibility of Statements Made by Declarant MacIntyre to Witness Slattery, is Inconsistent with Both the Traditional Standards Applied under Federal Rules of Evidence 801(d)(2)(C) and (E) Regarding Admissions and Emerging Principles of Public Policy.

The Court of Appeals found that "[t]here was sufficient evidence from which the district court could conclude, as it did, that MacIntyre was informed fully of the details of the conspiracy and was acting as appellant's agent when she talked to Slattery." Accordingly, it held MacIntyre's statements in the taped conversation to be admissible. *United States* v. *Teicher*, No. 79-1351, Slip op. at 2 (2d Cir. Dec. 19, 1979). The trial judge characterized the tape recording as "a statement in furtherance of a conspiracy by an agent" (Record at 167). It is thus impossible to determine with certainty whether the statement was held admissible as an authorized admission by an agent under Fed. R. Evid. 801(d)(2)(C) or a statement by a coconspirator during the course of and in furtherance of a conspiracy under Fed. R. Evid. 801(d)(2)(E).[1] Regardless of

[1] Although the Government asserted Fed. R. Evid. 801(d)(2)(D) as another basis for admissibility, Brief for the Appellee at 25, this need not even be con-

which ground was employed as the basis for admissibility, the lower courts erred in their application of the rules, in light of both traditional legal standards and emerging principles of public policy.

A. *Authorized Admission by an Agent: Fed. R. Evid. 801(d)(2)(C).*

A statement by a person authorized by a party to make a statement is treated as an admission by the party under Rule 801(d)(2)(C). Ordinarily, cases falling within this category are resolved by consideration of the principles of agency rather than by reference to principles of evidence. J. Weinstein & M. Berger, 4 *Weinstein's Evidence* ¶ 801(d)(2)(C)[01], at 801-152 (1979). In addition, the general rule is that there must be a showing of "speaking authority" for a statement to be admissible under this section. *Id.* These traditional standards were not met in the instant case.

The Government asserted on appeal that an agency relationship existed between petitioner Teicher and declarant MacIntyre based on the facts that they had lived together for two years and that MacIntyre apparently had knowledge of one of the alleged smuggling ventures. Brief for the Appellee at 25-26. Given these facts as the only conceivable basis for the Court of Appeals' decision, this Court should grant the petition for certiorari in order to make clear that such facts are not, and should not be, sufficient to establish the agency relationship required for the admissibility of a declarant's statements under Rule 801(d)(2)(C).

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sidered here. That subsection of Rule 801 categorizes as an admission an agent's statement if made within the scope of employment. Neither of the lower courts made reference to an employment relationship between petitioner Teicher and declarant MacIntyre, and there is no evidence whatsoever in the record to support such a finding.

With respect to the first fact, the Government characterizes the living arrangement of Teicher and MacIntyre as one of *de facto* marriage or essentially husband and wife at common law.[2] *Id.* It then concludes that MacIntyre, "like any wife . . . [was] authorized to communicate on behalf of her spouse with mutual friends." *Id.* at 26. This line of reasoning, apparently accepted by the lower courts, raises important questions of law and policy requiring authoritative resolution by this Court.

It is anachronistic to assume that a woman who lives with, or is married to, a man is thereby within his control for all — or indeed any — purposes. This assumption, on which the decisions below are implicitly based, is one that this Court recently chastised and repudiated. *Trammel* v. *United States*, 48 U.S.L.W. 4201, 4202, 4204 (Feb. 27, 1980). Moreover, it is well established that the issue whether the statements of a spouse are receivable as admissions against the other spouse is treated as a question whether there is authority to act as an agent and whether the statements were made in the course of exercising that authority. J. Weinstein & M. Berger, 4 *Weinstein's Evidence* ¶ 801(d)(2)(C)[01], at 801-152 (1979); J. Wigmore, 4 *Wigmore on Evidence* § 1078, at 180 (Chadbourn rev. 1972). The mere marital relation itself does not make spouses agents for one another. J. Wigmore, 4 *Wigmore on Evidence* § 1078, at 180 (Chadbourn rev. 1972). Given these longstanding principles with regard to the marital relationship, it can hardly be asserted that the fact of a mere living arrange-

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[2] Common law or *de facto* marriage does not exist under the laws of Massachusetts, the domicile of Teicher and MacIntyre, J. Lombard, 2 *Massachusetts Practice: Family Law* § 1035 (1967), and cohabitation in that state in the absence of a formal solemnization of marriage does not create the relationship of husband and wife. *Davis* v. *Misiano*, Mass. Adv. Sh. (1977) 1792, 1793, 366 N.E.2d 752, 754 (1977). Thus, the Government's initial point of departure is simply incorrect.

ment is a sufficient basis for receiving one party's declarations as an authorized admission against another. It offends notions of common sense and would contravene emerging principles of public policy to allow any lesser showing for admissibility of statements made by those living together than has traditionally been required under Rule 801(d)(2)(C) with regard to statements made by spouses.

Thus, the question properly becomes one of whether MacIntyre had authority to act as petitioner Teicher's agent, and whether her statements were made in the course of exercising that authority. The lower courts' rulings fly in the face of universally accepted precedent, and should be reviewed so as not to muddle this precedent or alter it in a direction specifically disapproved by this Court in *Trammel*.

The only established fact regarding the existence of an agency relationship between petitioner Teicher and declarant MacIntyre is that the latter apparently knew something about one of the smuggling ventures. People who live together presumably know a lot about each other's transactions, and this knowledge is clearly insufficient under Rule 801(d)(2)(C). The Rule, instead, requires that there must be some independent proof of the existence of the agency and its scope. J. Weinstein & M. Berger, 4 *Weinstein's Evidence* ¶ 801(d)(2)(C)[01], at 801-153 (1979). These facts are to be proven in accordance with the substantive law of agency. *Id.* Furthermore, the fact of agency may not be proved by the alleged agent's out-of-court statements unless these statements meet an exception to the hearsay rule. *Id.*; *e.g.*, *United States* v. *Miller*, 246 F.2d 486, 490 (2d Cir.), *cert. denied*, 355 U.S. 905 (1957). A correct analysis under the Rule, then, relegates knowledge and interest to the background, and looks instead to a grant of authority by the alleged principal to the alleged agent, and the scope thereof.

Considering the present case within this analytical framework leads to the inescapable conclusion that the lower courts erred. The Government having proved only MacIntyre's knowledge in this case, and that proof being based in substantial part on her own out-of-court statements (Record at 167-68), there is no proof at all as to the existence or scope of any agency relationship between Teicher and MacIntyre. The trial judge's factual determination of an agency relationship was clearly erroneous, and MacIntyre's statements were improperly received below. *See id.*; *Restatement (Second) of Agency* § 285 (1958). To allow the lower courts' rulings to stand would result in a grossly unjustified extension of the application of Fed. R. Evid. 801(d)(2)(C). At a time when "living together" is emerging as a more common and recognized form of relationship, the lower courts' reasoning requires consideration and repudiation by this Court.

B. *Statements by a Co-Conspirator: Fed. R. Evid. 801(d)(2)(E).*

Rule 801(d)(2)(E) makes admissible against a party an out-of-court statement by a co-conspirator during the course of and in furtherance of the conspiracy. If this was the portion of Rule 801 on which the lower courts relied, the Court should grant the instant petition for certiorari to prevent an undue extension of this subsection.

The overwhelming majority rule in the federal courts is that statements of an alleged co-conspirator are not admissible unless the trial court concludes that the prosecution has established the declarant's and defendant's participation in the conspiracy by a fair preponderance of the evidence exclusive of the hearsay utterances. *E.g.*, *United States* v. *James*, 590 F.2d 575, 580-82 (5th Cir. 1979) (en banc); *United States* v. *Andrews*, 585 F.2d 961, 966 (10th Cir. 1978); *United States* v.

Santiago, 582 F.2d 1128, 1133-36 (7th Cir. 1978); *United States* v. *Enright*, 579 F.2d 980, 984-85 (6th Cir. 1978); *United States* v. *Bell*, 573 F.2d 1040, 1043-44 (8th Cir. 1978); *United States* v. *Petrozziello*, 548 F.2d 20, 22-23 (1st Cir. 1977); *United States* v. *Stroupe*, 538 F.2d 1063, 1066 (4th Cir. 1976); *United States* v. *Projansky*, 465 F.2d 123, 137-38 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States* v. *Bey*, 437 F.2d 188, 191-192 (3d Cir. 1971).[3] In the instant case, the Court of Appeals could not have followed this majority rule, since the record establishes that no showing meeting the criteria of that rule was made. In the Second Circuit, it is well settled law that neither association with a conspirator nor knowledge of the conspiracy is sufficient to provide a basis for the admissibility of out-of-court statements of alleged co-conspirators. *United States* v. *Steinberg*, 525 F.2d 1126, 1134 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *see United States* v. *Ragland*, 375 F.2d 471, 477 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968). MacIntyre's association with Teicher and her apparent knowledge of one overt act of the conspiracy, therefore, could not be a basis for receiving her out-of-court statements. The record is devoid of any other evidence concerning her participation. Indeed, the Government itself conceded on appeal, with reference to the record, "that MacIntyre had not been proved a co-conspirator."[4] Brief of the Appellee at 27.

Thus, MacIntyre's statements would not be admissible as against petitioner Teicher under Rule 801(d)(2)(E) as a statement made by a co-conspirator during the course of and in furtherance of a conspiracy, and the lower courts could not properly have based their rulings on that subsection.

[3] Only the Ninth Circuit continues to apply a prime facie test for admissibility. *E.g.*, *United States* v. *Avila-Macias*, 577 F.2d 1384 (9th Cir. 1978).

[4] MacIntyre was neither indicted nor identified by the grand jury as an unindicted co-conspirator. For the sake of completeness, it should also be noted that her statements to Slattery cannot be used as evidence of her participation. *E.g.*, *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).

Petitioner Teicher is not here arguing that declarant MacIntyre could not have been a *witness* against him — subject to cross-examination. *See generally Trammel* v. *United States*, 48 U.S.L.W. 4201 (Feb. 27, 1980). There is simply no basis, however, for receiving MacIntyre's statements as either an authorized admission by an agent, under Rule 801(d)(2)(C), or as a statement of a co-conspirator during the course of and in furtherance of the conspiracy, under Rule 801(d)(2)(E). The lower courts' rulings reflect an extension of these admissions doctrines that is unfounded in present law and contrary to public policy.[5]

II. The Decision Below, Holding Proper the Joinder of Counts Involving the Actual Seizure of Heroin from the Alleged Accomplice with Those Involving Earlier Trips for Which There was No Tangible Evidence, Ignores the Substantial Prejudice Inuring to the Petitioner from Such Joinder and is Inconsistent with Case Law in Other Circuits Prohibiting Joinder in Like Instances.[6]

Whenever several counts are joined in one indictment there is the danger that a jury may cumulate the evidence of the

[5] Petitioner contends that the admissibility of declarant MacIntyre's statements was highly prejudicial to him. If this Court does not agree with petitioner's characterization of the error, a remand to the Second Circuit Court of Appeals would appear in order to allow for briefing and argument on this issue.

[6] Although no formal motion for severance was made in the District Court, the Court of Appeals in this case did not address the question of waiver. As is customary, however, *United States* v. *Gougis*, 374 F.2d 758, 762 (7th Cir. 1967), the Court of Appeals decided the joinder issue on its merits. Therefore, the issue of prejudicial joinder of counts is properly before this Court on certiorari.

various crimes charged and find guilt when, if considered separately, a jury would not so find. This is especially so in cases like the instant one where each count charges a violation arising from similar types of transactions by the same defendant. The substantial prejudice inuring to a defendant as a result of such joinder of offenses has been a subject of great concern to the federal courts, the state courts, and even the courts of England. As was said by Hawkins, J., in the oft-cited case of *Queen* v. *King*, [1897] 1 Q.B. 214, 216:

> . . . it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each one of the charges by the evidence which is being given up on the others.

The federal courts in this country have held that there is no prejudicial effect from joinder when the evidence of each crime is simple and distinct, even where, as here, evidence of each offense would have been inadmissible to prove the other offenses had there been separate trials on separate counts. *See, e.g., Drew* v. *United States*, 331 F.2d 85, 91 (D.C. Cir. 1964). This rests upon the assumption that, with a proper charge, the jury can easily keep such evidence separate in their deliberations and, therefore, the danger of the jury's cumulating the evidence is substantially reduced. *E.g., United States* v. *Lotsch*, 102 F.2d 35 (2d Cir. 1939). The rule in *Drew*, 331 F.2d at 91, however, has been criticized on the ground that it places too much faith in limiting instructions to the jury and, by so doing, ignores the rationale of the rule against proof of other crimes. Note, *Joint and Single Trials under Rules 8 and 14 of the Federal Rules of Criminal Procedure*, 74 Yale L.J. 553, 557-58 (1965). Further, with regard

to the facts of the instant case, the *Drew* rule is inapplicable. The evidence of each offense charged is neither simple nor distinct, and there is a great likelihood that the jury utilized the evidence on counts involving the actual seizure of heroin in order to convict the petitioner on the other counts for which there was no tangible evidence.

Moreover, other Circuit Courts of Appeal have held that joinder is especially prejudicial to a defendant, and hence inappropriate, where the prosecution employs joinder of counts to try a weak evidentiary case with a strong one in the hope that the overlapping evidence will lead to convictions on both. *E.g., United States* v. *Clayton*, 450 F.2d 16, 19 (1st Cir. 1971), *cert. denied*, 405 U.S. 975 (1972). The leading case here, *United States* v. *Foutz*, 540 F.2d 733 (4th Cir. 1976), is particularly instructive. In *Foutz*, a case involving two separate bank robberies, the court stated:

> We think it highly probable that a jury ignorant of the second crime and Foutz' alleged participation therein would have acquitted him of the earlier robbery. There is thus a strong likelihood that the jury found Foutz guilty of the second robbery, and then concluded that since he had once robbed the bank, it was plausible that he had done so before. Since we cannot say that the government's case with respect to the . . . [second] robbery was indefensible, it is possible that the jury found him guilty of that crime under the rationale that with so much smoke there must be fire. Had the two offenses not been joined for trial, these "spillovers" could not have occurred, and Foutz might well have been acquitted of the first crime; possibly of both. *Id.* at 739.

In the instant case, the counts involving earlier trips for which there was no tangible evidence were supported only by

the uncorroborated testimony of the alleged accomplice Slattery. There is little doubt that each of these counts, standing alone, would have constituted an extremely weak case — especially in light of the substantial attack by the defendant on Slattery's credibility.[7] Thus the petitioner suffered substantial prejudice as a result of the joinder of counts in his indictment and is entitled to relief therefrom for cause shown. Fed. R. Crim. P. 12, 14, 52(b).

Conclusion.

For the foregoing reasons, petitioner respectfully requests this Court to grant the instant petition for certiorari and either to set the case down for argument or to reverse the conviction summarily and order a new trial.[8]

Respectfully submitted,

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
(617) 661-1965

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[7] Indeed, there is considerable doubt that these counts would have withstood a motion for judgment of acquittal. In the courts of several states a defendant cannot be convicted on the uncorroborated testimony of an accomplice alone. *E.g.*, *People* v. *Malizia*, 4 N.Y.2d 22, 171 N.Y.S. 2d 844 (1958); *LaBryer* v. *State*, 222 So.2d 361 (Ct. App. Ala. 1969); *People* v. *Tewksbury*, 127 Cal. Rptr. 135, 544 P.2d 1335 (1976).

[8] At the very least, the case should be remanded to the Court of Appeals for reexamination in light of *Trammel*.

Appendix A.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of December, one thousand nine hundred and seventy-nine.

Present: HON. J. JOSEPH SMITH
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. LEONARD B. SAND
United States District Judge
Sitting by Designation

UNITED STATES OF AMERICA,
APPELLEE,

v. Docket No. 79-1351

ROBERT TEICHER,
DEFENDANT-APPELLANT.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the jugment of said District Court be and it hereby is *affirmed*.

On this appeal, appellant Teicher raises several claims of error which he says were committed by the district court during his jury trial on various counts of charging violations of the federal narcotics laws.

First, appellant contends that the evidence against him was insufficient to support the jury's guilty verdict. We find this contention to be without merit. There was ample evidence to show that his accomplice, Anne Slattery, indeed was importing controlled substances. Appellant told her that she was going to be smuggling heroin into the country. On one occasion she bought the drugs herself; on another she watched while the drugs were packaged; and on another she saw a third accomplice "snort" the drug being imported. There was substantial evidence to show a conspiracy to import drugs and overt acts committed by appellant and Slattery in furtherance of the conspiracy. Finally, the combined testimony of the DEA agents was sufficient to show that appellant was in possession of heroin when arrested.

Second, appellant contends that he was prejudiced by the joinder of the counts involving the actual seizure of heroin with the counts involving earlier trips abroad to import drugs. We find this argument to be unpersuasive. The testimony at trial demonstrated that all the trips, including the one that concluded with the arrest of Slattery and the seizure of the heroin, were part of a common scheme to import narcotics. In each instance, appellant would finance the trip; Slattery would act as courier; and either appellant or a third accomplice would meet Slattery abroad and then again when she returned to this country with the drugs. After each trip, discussions were held concerning future trips. We hold that the joinder of the counts stemming from these various trips was proper.

Third, appellant challenges the admission in evidence of a tape recording of a conversation between his girlfriend, MacIntyre, and Slattery. There was sufficient evidence from which the district court could conclude, as it did, that MacIntyre was informed fully of the details of the conspiracy and was acting as appellant's agent when she talked to Slattery. We hold that the conversation was admissible.

Finally, appellant contends that the district court erred in admitting testimony concerning post-arrest statements made by Slattery. We hold that these statements were admissible to rehabilitate Slattery by demonstrating that she had not tailored her testimony to fit the corroborative documentary evidence uncovered by the government.

We have considered carefully all of the arguments of appellant on this appeal and find them to be without merit. We order that the mandate issue forthwith.

Affirmed.

/s/ J. JOSEPH SMITH

/s/ WILLIAM H. TIMBERS
Circuit Judges

/s/ LEONARD B. SAND
United States District Judge
Sitting by Designation

Appendix B.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of March, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA,
APPELLEE,

v. 79-1351

ROBERT TEICHER,
APPELLANT.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ IRVING R. KAUFMAN
Chief Judge

Due to his untimely death on February 16, 1980, Judge Smith, a member of the panel, did not participate in the consideration of this petition.

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of March, one thousand nine hundred and eighty.

Present: HONORABLE WILLIAM H. TIMBERS
HONORABLE J. JOSEPH SMITH
Circuit Judges
HONORABLE LEONARD B. SAND
District Judge

UNITED STATES OF AMERICA,
APPELLEE,

v. 79-1351

ROBERT TEICHER,
APPELLANT.

A petition for a rehearing having been filed herein by counsel for the Appellant.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ A. DANIEL FUSARO,
Clerk